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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-912

CHARLES ALBERT MULLIGAN, PHILIP BRUCE CHRISTOPHER and AMIL ALFRED DINSIO,
*Petitioners,*

—v.—

UNITED STATES OF AMERICA,
*Respondent.*

## JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Charles Albert Mulligan, Philip Bruce Christopher and Amil Alfred Dinsio pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit, entered on November 9, 1973, which affirmed judgments of conviction previously entered against each of the petitioners in the United States District Court for the Central District of California.

### Opinions Below

Following the entry of judgments of conviction in the District Court, the petitioners appealed to the Court of Appeals. On November 9, 1973, the Court of Appeals rendered its opinion, *United States* v. *Mulligan*, et al, — F.2d —.

The opinion of the Court of Appeals is reproduced as Appendix A of this Petition (1a, *et seq.*).*

## Jurisdiction

On November 9, 1973, the Court of Appeals entered judgment against the petitioners (1a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Constitutional and Statutory Provisions Involved

The questions raised in this petition involve the search and seizure provisions of the Fourth Amendment, the Due Process and Self Incrimination Clauses of the Fifth Amendment, and the Confrontation and Right to Counsel provisions of the Sixth Amendment to the United States Constitution, which are as follows:

### Fourth Amendment

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

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* The following abbreviations are used in this petition:

"—a" — is a reference to the opinion of the Court of Appeals which appears in the appendix to this petition;

"R. —" — is a reference to the first two volumes of the Record on Appeal which is on file in the United States Court of Appeals;

"T. —" — is a reference to the reporter's transcript of proceedings in the District Court;

"GX. —" — is a reference to the government's trial exhibits;

"DX. —" — is a reference to the defendants' trial exhibits.

**Fifth Amendment**

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

**Sixth Amendment**

"In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

**Questions Presented For Review**

1. In arresting the petitioner Christopher upon a parole violation warrant, did the arresting officers exceed their authority to make an incidental search, in violation of the principles set forth in *Chimel* v. *California,* 395 U.S. 752 (1969)?

2. Did the underlying affidavit fail to establish probable cause for the issuance of a search warrant as to the home of Petitioner Dinsio?

3. Should certain post-conspiratorial admissions by the petitioner Mulligan have been excluded from evidence at this joint trial upon the ground that those statements violated the rights of the Petitioners Christopher and Dinsio to confront and cross-examine witnesses against them, as enunciated in *Bruton* v. *United States,* 391 U.S. 123 (1968)?

4. Should certain alleged post-conspiratorial admissions by the petitioner *Dinsio* have been excluded from evidence at this joint trial upon the ground that those admissions violated the rights of the petitioners Mulligan and Christopher to confront and cross-examine witnesses

against them, as enunciated in *Bruton* v. *United States*, 391 U.S. 123 (1968)?

5. Were petitioner Dinsio's alleged admissions secured from him in violation of his right against self-incrimination and his rights to counsel?

6. In view of the uncontested post-trial allegation, supported by sworn affidavits, that defense counsel had been threatened during the course of the trial by a member of the prosecution staff, should the District Court have convened a hearing to determine the trtuh of that allegation, and, if found to be true, did this deprive the defendants of the effective assistance of counsel?

## Statement of the Case *

Following a lengthy jury trial, judgments of conviction were entered against the three petitioners in the United States District Court for the Central District of California convicting each of them upon: one count of conspiracy to burglarize the United California Bank (hereinafter "the bank") (18 U.S.C. Sec. 371); one count of entering the bank on or about March 24-27, 1972, with intent to commit larceny (18 U.S.C. Section 2113 [a]), and theft from the bank of money and property of a value exceeding $100.00 (18 U.S.C. Section 2113 [b]).

Each of the petitioners was sentenced pursuant to 18 U.S.C. Section 4208 (a)(2) to terms of five years, twenty years and ten years with respect to counts 1, 2, and 3 respectively, all to be served concurrently for a total of twenty years (R. 484, 485, 499).

### 1. The Burglary

On Friday evening, March 24, 1972, the bank's vault was locked and a timing mechanism was set so that it

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* A key to the abbreviations used in this petition is set forth in footnote I, *supra* at p. 2.

would not reopen until the following Monday morning (T. 1060-61). Efforts to open the vault on that Monday were unsuccessfull (T. 1061). During the course of the day, it was discovered that the vault had been burglarized through a hole in the roof (T. 1078-1082).

A crime scene investigation determined that a number of safety deposit boxes had been looted (T. 1061-62, 1082-1085). Various parts of tools and miscellaneous items were found in and on top of the vault (T. 1148).

It was further determined that among the safety deposit boxes that had been emptied were six in which the various bank tellers secured their cash boxes for the weekend (T. 1321). An audit revealed that a total of $45,256 was missing from these boxes, including a sum of "plant" money as to which the bank had a record of serial numbers (T. 1313, 1339-45).

At trial the government and each of the petitioners jointly stipulated that nine of the numerous private safety deposit owners would testify that various specified securities having a total value of approximately one million dollars were missing from the respective safety deposit boxes (T. 1700-39). Two other safety deposit box holders actually testified at the trial including one, Hattie Waggonner Dailey who alleged that a collection of $204.00 in various denominations were missing from her box. She had previously recorded the serial numbers of some of the bills (T. 2631 et seq.).*

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* Two five dollar bills from this collection were found in a clothing bag during the search of the Petitioner Christopher's closet in Ohio on June 21, 1972. We urge at pp. — — *infra*, that the search of the Petitioners closet violated this Courts holding in *Chimel* v. *California*, 395 U.S. 752 (1969).

**2. The Prosecution's Theory of the Case**

At the trial, the prosecution conceded that there was no direct evidence that any of the petitioners had ever entered the bank (T. 3867). Instead, the prosecution relied upon various items of circumstantial evidence, and certain alleged admissions of petitioners Mulligan and Dinsio.

The government's circumstantial evidence was extensive and established that:

a. During the month preceding the burglary, the petitioners and others, singly and in groups, traveled back and forth across the country to the geographical area near the bank, and remained in that area for periods of time, staying in a motel or in briefly leased premises;*

b. Various of the alleged conspirators purchased items which may have been used in the perpetration of the burglary;

c. Certain items which may have been used in the burglary or certain fruits of the burglary were later found in premises inhabited by various of the alleged conspirators or on premises in which various of the conspirators, including petitioners, had been, as established by eyewitnesses and fingerprints;

**3. Petitioner Mulligan's Alleged Post-Conspiracy Statements**

During the month preceding the burglary according to the government's theory of the case, petitioner Mulligan had prevailed upon an old military friend, Dawson, to permit Mulligan to store an automobile in Dawson's garage

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*See: T. 1252, *et seq.*; 1351-3; 1374-90, *et seq.*, 1401-1402; 1466-1469; 1487; 1491; 1551-1559; 1696-1698; 2220-2233; 2980; and government exhibit 90, which is a government chart of the comings and goings of the various petitioners.

(T. 2222-2223). Unbeknownst to Dawson, the vehicle was used as a storage place for the burglary tools. On March 27, 1972, the day after the burglary, Mulligan advised Dawson that he would have to leave the automobile in the garage for several additional weeks, and Dawson agreed to let him do so (T. 1427, 2249-2252). However, Dawson did not again hear from Mulligan until June 2, 1972. On that day, the FBI, by virtue of an exhaustive investigation, came to interview Dawson and learned of the car which was in his garage. Ironically, while Dawson was being questioned at his home, and while the FBI was arranging for a warrant to search the car, Dawson received a telephone call from Mulligan, who said he was coming to Los Angeles that day to pick up his car (T. 2254-2255). The agents listened in on the conversation, and were able to have Dawson arrange to meet Mulligan at a local bar. During the meeting, and at the request of the FBI, Dawson, allegedly, successfully was able to get Mulligan to admit participation in the burglary, and Dawson so testified at trial (T. 2258-2261).

**4. The Search At the Time of Christopher's Arrest**

At approximately 7:20 A.M. on June 21, 1972, F.B.I. Agents Daniel Gordon and John Roberson, together with approximately eight other law enforcement officials, arrived at a single family residence in Cleveland, Ohio, armed with a warrant for the arrest of petitioner Christopher *for violation of federal parole* (T. 12, 13, 49, 81 and 91).

Gordon approached the front screen door, observed a female inside, identified himself as an agent of the F.B.I., and asked for Christopher (T. 13). Upon being admitted, Gordon, followed by several agents, proceeded to the second floor and observed Christopher standing in pajama shorts in the upstairs hallway. Gordon identified himself and placed Christopher, who made no attempt to flee, under arrest for the parole violation (T. 14, 45).

Neither Gordon nor any of the other agents drew their guns or attempted to handcuff Christopher. They merely directed him to identify the room from which he had come. Christopher directed them to a bedroom off the hall (T. 14-15). At the direction of the agents, he preceded five of them into the bedroom, where he was placed, unhandcuffed, on the bed. Agent Gordon stood approximately two feet from him, leaning against a dresser (Tr. 14, 29-31; DX K).

The other agents assumed positions around the 10 foot by 12 foot room. Two of them stood on the other side of the bed facing Christopher's back, while Agent Roberson, stood between Christopher and A's closet, which was located more than three feet from Christopher (Tr. 20, 40).

The two agents behind Christopher searched the pillow and bed. Nothing was found. Christopher then got off the bed, picked up a pair of undershorts lying on the floor, returned to the bed and put the shorts on (T. 21). Shortly thereafter, Christopher rose from the bed and said he wished to get a pair of pants. He was told to sit down (T. 21). Agent Roberson, turned his back to Christopher and took a pair of pants hanging on a hook on the closet door. He handed them to Agent Gordon, who emptied the pockets and handed them to Christopher (T. 21, 22, 54, 55). With the agents watching, Christopher then put on his pants and a shirt (T. 22).

As Christopher was putting on his pants, Agent Roberson, his hands on his holstered gun, entered the closet, allegedly to see if there was anybody hiding in it. No one was (Tr. 55). Nevertheless, using his left leg, he brushed the clothing that was hanging in the closet and felt a large lump in the bottom of a garment bag (T. 55). Notwithstanding the fact that the defendant was already under the control of the other agents in the room, Roberson unzippered the garment bag and found a tightly wrapped "white icecream bag. He unwrapped the package and found a ice cream bag. He unwrapped the package and found a

quantity of cash inside, including two five-dollar bills which the Government alleged were part of the "bait money" which had been taken during the burglary of the bank (T. 55-58).

**5. The Search of the Dinsio Residence**

On June 27, 1972, the petitioner Dinsio was arrested by government agents. *Thereafter,* the agents sought a warrant from a Federal magistrate in Cleveland, Ohio, to search Dinsio's home in Boardman, Ohio. Upon receiving a telephone message to the effect that the warrant had been signed, some twenty-five to thirty federal agents descended upon Dinsio's home. The only one home at the time was Dinsio's mother-in-law, Mrs. Mary Mulligan. The agents forced their way into the residence, a split-level, single family dwelling, and commenced a five hour search of the premises (T. 258-269).

During the course of the search, the agents seized Mrs. Mulligan's purse from a chair and found that it contained some $540.00 (T. 263, 275, 529-540). Amongst this money was a twenty dollar bill which proved to be a part of the "bait money" that was missing from the bank. The government offered that bill into evidence against the petitioners (T. 578-579).

The warrant for the search of the Dinsio home was based entirely upon the affidavit of FBI agent H. Mark Goodwin, Jr. The opinion of the Court of Appeals correctly describes the "salient allegations" of the affidavit as follows:

> "1. Dinsio was connected with the burglary of the Bank. A June 2, 1972, search of an automobile, discussed *infra,* produced, among other items, a shotgun, walkie-talkies, drills, flashlights and batteries, gloves, hammers, and three gold coins identified as having been stolen during the burglary

from a safety deposit box in the Bank. One of the hammers was identified as the tool used to force safety deposit boxes during the burglary. In addition—Dinsio's fingerprints were found on the flashlight batteries.

"2. $98,600 was discovered buried in the ground across the street from Dinsio's residence.

"3. According to a reliable informant, Dinsio's habit upon completing a burglary was to bury some of the loot.

"4. A reliable informant was told by Dinsio that he had robbed an Ohio bank and had a large portion of stolen money in his possession.

"5. The Boardman, Ohio, address was Dinsio's sole residence.

"6. When Dinsio was arrested he had $537 on his person" (5a).

### 6. Petitioner Dinsio's Alleged Post-Arrest Statements

During the summer of 1972, petitioner Dinsio was arrested in this case and was held in the Los Angeles County Jail. Richard A. Gabriel, arranged to have his cell block location moved to that of Dinsio.

Gabriel is a professional burglar who appears to had an arrangement with the Los Angeles Sheriff whereby he avoided prosecution or minimized his punishment when he was regularly captured, by turning states evidence on his accomplices or by supplying information which he allegedly learned from prisoners while confined in jail (T. 206-214). He had even persuaded law enforcement officers of Los Angeles to seek clemency in his behalf with respect to charges pending in other counties (T. 3189). Gabriel, who testified at the instant trial, admits having read about this

case in the newspapers as well as having read the pre-trial motion papers. Dinsio allegedly confessed to him the details of the bank burglary (Tr. 3490-3507).

## REASONS FOR GRANTING THE WRIT

### I.

**The search conducted at Christopher's residence was in violation of his Fourth Amendment right against unreasonable searches and seizures.**

Prior to trial, petitioner Christopher moved to suppress all evidence and leads obtained as a result of the warrantless search of his bedroom closet (R. 318-324). After a hearing (T. 12, *et seq.*), the District Court denied the motion. The Court of Appeals sustained the validity of the search 2a-4a), which yielded $30,000 in cash, including two five dollar bills that were admitted in evidence as being part of the "bait money" which had been taken during the burglary of the bank (T. 55-58).

The circumstances of the search are set forth *supra*, at pp. 7-9. They show that while unclothed and surrounded by FBI agents who were arresting him for a parole violation, Christopher reached toward the bedroom closet to get a pair of pants. The agents told him to remain seated on the bed, and then proceeded to get the pants, search them, and hand them to him. As Christopher put his pants on, the following occurred as recounted by the Court of Appeals:

> "Agent Robertson then drew his gun and 'brushed the clothing that was hanging in the closet aside to see if there was anybody hiding in there.' He felt 'a large lump in the bottom of a garment bag, a hard lump that could have been a weapon.' He then reached into the garment bag and pulled out a package of money, which contained approximately $30,000 in cash" (3a).

In fact, the Court understates the fact in certain material respects. The agent who made the search conceded that he was, at all times, in a position to block any attempts by Christopher to reach the closet (T. 62). Of even greater significance, in order to reach the cash, the agent first unzippered the garment bag and then found an ice cream freezer bag which was tightly wrapped with rubber bands. It was only after he unwrapped the package that he discovered the quantity of cash inside (T. 55-58).

The Court of Appeals justified the search upon the following rationale:

> "The real issue, then, is whether the closet was within Christopher's 'immediate control'; was it an 'area from within which he might gain possession of a weapon . . .?' It was not unreasonable for Agent Roberson to search the open closet to see if someone was hiding there with a weapon to help Christopher resist arrest or effect his escape. The search was additionally justified by Christopher's two sudden movements toward the open closet. Although he was ostensibly trying to reach his clothes, these two actions surprised the agents and aroused Agent Roberson's suspicions that someone might be hiding in the closet with a weapon. Under these circumstances, the closet was within Christopher's immediate control; it was an 'area from within which he *might* gain possession of a weapon . . .'" [Emphasis in original] (3a-4a).

Assuming that the agent could reasonably fear a hidden confederate in the closet, he soon discovered there was no such person there. It would be absurd to believe he felt a confederate might be hiding in the garment bag that was hanging in the closet. Nevertheless, the agent unzippered the bag. Assuming that the agent could reasonably believe that Christopher might have been able to evade the agents surrounding him, get to the garment bag, unzipper it, and

reach inside, that fear, too, was shown to be unfounded when the agent discovered that the hard item in the bottom of the garment bag was a tightly wrapped package not shaped like anything one would recognize or reasonably suspect to be a weapon. We respectfully submit that, upon finding the package, particularly in light of all the other surrounding circumstances, the agent had no reasonable cause to proceed to open it as an incident to Christopher's arrest.

It is well established that searches conducted without the prior approval of a Magistrate are *per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. None of those exceptions are appropriate here. *Coolidge* v. *New Hampshire,* 403 U.S. 443, at 454-455.

In *Chimel* v. *California,* 395 U.S. 752 (1969) this Court delineated the guidelines for searches allegedly made incident to a lawful arrest:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person, in order to prevent its concealment or destruction; and the area into which an arrestee might reach in order to grab a weapon or evidentiary items must of course be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of a person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area

from which he might gain possession of a weapon or structible evidence." 395 U.S. at 762-3.

Agent Roberson's search of the closet clearly violated the holding of *Chimel.* See: *United States* v. *Mapp,* 476 F.2d 67 (C.A. 2, 1973); *United States* v. *Marotta,* 326 F. Supp. 377, Aff'd 456 F.2d 1336 (C.A. 2, 1972); *United States* v. *Gamble,* 473 F.2d 1274 (C.A. 7, February 12, 1973), 12 Cr. L. Rep. 2480; *United States* v. *Shye,* 473 F.2d 1061 (C.A. 6, 1973); and *United States* v. *Mitchell,* 472 F.2d 67 (C.A. 9, 1973).

In *Mapp, supra,* the police followed the main defendant into a multiple dwelling and observed him entering an apartment. As Mapp scurried out the back door, the officers broke down the front door and entered the apartment with guns drawn. They there observed a woman sitting on a bed. She was immediately arrested and asked where the contraband was. She pointed in the direction of a closet. The agents then searched the closet and found a brown paper bag containing heroin. In rejecting the Government's assertion that the search of the closet had been incidental to the woman's arrest, the Second Circuit held:

> "* * * Officer Crowe testified, however, that he was standing between Mrs. Walters and the closet at the time he asked her for the package which Mapp had left earlier. At the time the demand was made, there were five or six officers in the one-bedroom apartment, certainly more than sufficient man-power to prevent Mrs. Walters from reaching the closet. Unless, Mrs. Walters were either an acrobat or a Houdini, . . . we cannot conceive how the closet could have fallen within the area of her immediate control. To say that the closet was an area in which she was able to reach, despite the fact that an armed officer stood between her and it, would in effect be to hold that a search of all of the enclosed places in Mrs. Walter's bedroom would have been consistent with the Fourth Amendment—a result explicitly fore-

closed by *Chimel.* Accordingly, we cannot say, on the basis of the objective facts in the record, that the closet was within Mrs. Walter's area of immediate control within the meaning of Chimel." 476 at 80.

In *Shye, supra,* under facts similar to those of the present case, the Sixth Circuit rejected a similarly spurious access argument and then went on to consider the "plain view" significance of a paper bag:

"Completely without merit is the argument of the Government that the sack of money was lawfully seized because it was in 'plain view' of the law enforcement agent. All that was in plain view was a plain brown bag which did not itself constitute evidence, a fruit, or an instrumentality of the crime. *Compare People of State of California* v. *Hurst,* 325 F.2d 891, 898-899 (9th Cir. 1963), rev'd on other grounds, 381 U.S. 760, 85 S.Ct. 1796, 14 L.Ed.2d 713 1965). As Mr. Justice Stewart stated in *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 466, 91 S.Ct. at 2038, 'the extension of the original justification [for intruding onto the premises] is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.' It is true, as the Government argues, that bags are made to contain things, and the bags might well have contained a weapon or evidence. However, closets or drawers of a dresser or rooms in an apartment are made to contain things, but the plain view doctrine does not allow general searches of such areas within the view of the arresting officers in the hope that incriminating evidence will turn up. *See Chimel* v. *California, supra,* 395 U.S. at 763, 89 S.Ct. 2034." 473 F.2d at p. 1066.

Similarly, in the instant case, even if one assumes that the search of the closet was a "plain view search," the search of the garment bag and the subsequent unwrapping of the sealed ice cream bag were not. See also *United States* v. *Mitchell, supra.*

## II.

**The underlying affidavit for the warrant to search the residence of Dinsio was insufficient to establish probable cause for the search.**

As noted by the Court of Appeals (5a-7a), the only significant allegations of the application for the Dinsio search warrant were that: 1) Dinsio had been connected with the Bank burglary (he was then under arrest); 2) a sum of money had been found buried across the street from Dinsio's residence; 3) a reliable informant said that it was Dinsio's habit upon completing a burglary to bury some of the loot; 4) this was Dinsio's sole residence; and 5) Dinsio had $537 on his person when arrested.

Relying upon this Court's opinion in *United States* v. *Ventresca,* 380 U.S. 102 (1965), the Court of Appeals, while conceding that there had been no evidence presented that anything was in Dinsio's residence, concluded that there was, nevertheless, "sufficient probable cause":

> "They linked Dinsio with the crime, and the allegation concerning the buried money linked him with evidence of the crime. The latter allegation meets the double test of Aguilar [v. State, 378 U.S. 108 (1964)]. *Although there was no direct evidence that any evidence from the burglary was inside Dinsio's residence,* there was sufficient evidence from which the Magistrate could use his common sense to infer that the loot and tools, if not buried, were probably in the house. United States v. Ventresca, supra, 380 U.S. at 108. The fact that Dinsio was arrested with

> only $537 on his person and that the Boardman house was his sole residence increased this probability" (6a-7a).

We find nothing in *United States* v. *Ventresca, supra,* to support its use by the Court of Appeals. Indeed, we find to the contrary:

> "This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based. See Aguilar v. State of Texas, supra." (380 U.S. at 108-109).

The common sense approach thereafter indicated in *Ventresca,* and relied upon by the Court of Appeals must be something more than merely showing that the defendant was probably guilty of the crime and probably had control over some of the proceeds. There must be facts tending to show that the property which was the subject of the search is probably on the premises to be searched at the time the warrant is issued. *Durham* v. *United States,* 403 F.2d 190, 193 (C.A. 9, 1968); *United States* v. *Flanagan,* 423 F.2d 745 (C.A. 6, 1970); *United States* v. *Lucarz,* 430 F.2d 1051, 1055 (C.A. 9, 1970); and *United States* v. *Upshaw,* 448 F.2d 1218 (C.A. 5, 1971).

If the law of the present case is permitted to stand, it is precedent for a radical departure from existing standards for the issuance of a search warrant.

Viewed in their true perspective, the facts of this case, come down to nothing more than the following:

> The F.B.I. suspected that Christopher, a known acquaintance of the defendants Mulligan and Dinsio, was somehow involved in the burglary of the bank.*

However, they apparently did not have sufficient grounds to obtain a search warrant. Nevertheless, approximately ten agents sought to effect an arrest of Christopher on an alleged federal parole violation.

In short, the agents used the guise of a technical violation of law to conduct a general search of the defendant's room and closet. *United States* v. *James*, 378 F.2d 88 (C.A. 6, 1967); *United States* v. *Baca*, 417 F.2d 103, 105 (C.A. 10, 1969; *United States* v. *DeLaCruz Dellinger*, 422 F.2d 723, 725, (C.A. 9, 1970).

## III.

**Each of the petitioners was deprived of his constitutional right to be confronted by and to cross-examine the witnesses against him, by virtue of the introduction into evidence of the unsworn alleged admissions of co-defendants.**

At trial, and over objection (R. 369; T. 224-226, 832-844), the Government was permitted to introduce into evidence the testimony of Dawson concerning alleged inculpatory admissions made to him by Mulligan (*supra*, p. 7). Similarly, the Government witness Gabriel was permitted, over objection (T. 3441 et seq.) to testify concerning alleged inculpatory admissions made to him by the defendant Dinsio (*supra*, p. 7).

With respect to both of the alleged admissions, the Court instructed the jury that the statements were admitted in evidence only against the declarants, and were not to be used in the jury's determination of the guilt or innocence of the other defendants (T. 4088).

In *Bruton* v. *United States*, 391 U.S. 123 (1968), it was held that the introduction of a co-defendant's confession can add substantial weight to the government's case in a form not subject to cross-examination by the defendant, thereby violating the defendant's Sixth Amendment right

of cross-examination. This Court went on to hold that such an encroachment on a defendant's constitutional right cannot be avoided by a jury instruction to the effect that the jury should disregard the confession as against the non-confessing defendant. In so holding, there was quoted with approval the following statement of Chief Justice Traynor in *People* v. *Aranda,* 63 Cal. 2d 518, 528-529, 407 P. 2d 265, 271-272:

> "* * * In joint trials . . . when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any co-defendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes' . . . it cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A."

The Court of Appeals rejected our *Bruton* arguments, with the following reasoning:

> Appellants' reliance on *Bruton* is misplaced. Mulligan's statements inculpated only Mulligan. Dinsio's statements inculpated only Dinsio. Appellants ask us to extend the *Bruton* rule to exclude the admission of one defendant even though the admission does not directly implicate a co-defendant. We decline to do so.
>
> "There is little danger that a jury in a joint trial, in weighing the evidence against A, will consider against A an admission by B concerning only B's activities. Following the appellants' argument to its

logical conclusion would require separate trials in every case where any defendant has made an admission. Such a holding is wholly unwarranted" (10a).

It is true that the *Bruton* problem usually arises under circumstances where the confessing defendant directly inculpates the non-confessing defendant in the commission of the crime charged. We respectfully submit that a reasonable view of the facts in the present case can leave no other conclusion than that the statements of Mulligan and Dinsio had precisely the same effect. Mulligan allegedly admitted to Dawson that he had participated in the burglary and that the 1962 Oldsmobile contained items which were used in or the result of the perpetration of that burglary. Dinsio also allegedly, admitted that he had participated in the burglary and went on to describe the type of equipment which was used—some of which was of the type that was found in the Oldsmobile.

While neither of these statements referred to the identity of the other participants in the burglary, the trial proof concerning the interrelationships and associations of the defendants at trial, as well as their relationship to the 1962 Oldsmobile, made it as difficult for the jury to cast the admissions aside with respect to the other defendants as would be the case if tohose defendants were directly named in the admissions.

When a case is as heavily weighted with circumstantial evidence drawn from the fact of association during a period that must have, for the actual perpetrators, involved an intense amount of planning, the admissions of one suspect cannot possibly be presumed to be eradicated from the juror's minds by a limiting instruction. As was held in *Bruton, supra*:

> "Despite the concededly clear instructions to the jury to disregard Evans' inadmissble hearsay evi-

> dence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all" (391 U.S. at 137).

In ignoring the context in which the alleged admissions went to the jury, the Court of Appeals permitted that to be done indirectly which, concededly could not be done directly."

## IV.

**The testimony of the Government's informant-witness warrants a reversal of the conviction of the petitioner Dinsio in the interests of justice and in the exercise of this court's supervisory jurisdiction.**

As noted *supra,* at pp. 10-12, Dinsio fell victim to a professional jail house informant. Whether that informant was telling the truth or not is immaterial, and is not likely to be discovered in any event. The fact is that the informant, Gabriel, had a lengthy history of exchanging information in return for his freedom. He maneuvered his way to a cell block in which he would have ready access to Dinsio, the only other caucasian there. At his first oportunity, he gave information to the authorities concerning his alleged conversations with Dinsio. There can be no doubt that this was his intent from the outset.

Gabriel was a creature of law enforcement. Over many years he had been permitted to take advantage of other men when they are in their most vulnerable psychological and legal state.

The defense was not advised of the content of Gabriel's supposed testimony until the day before it was given. Like a bombshell, it was revealed not only that he inculpate

Dinsio, but also defense attorneys—if permitted. The defense was left without any meaningful opportunity to conduct a careful investigation which might have tipped the scale of credibility with respect to Gabriel's testimony.

We respectfully urge this Court to examine that testimony and, after such examination, to reverse the defendant Dinsio's conviction in the interest of justice and in the exercise of its supervisory power. It cannot be said that the existence of a character such as Gabriel is not an extension of governmental action. Insofar as Dinsio was under indictment at the time of these alleged discussions, the spirit of *Massiah* v. *United States,* 377 U.S. 201 (1964), should require a reversal of his conviction. See also the facts set forth in *Beatty* v. *United States* 377 F.2d 181 at 190-191 (5th Cir., 1967), which prompted summary reversal by this court on this ground, *Beatty* v. *United States,* 389 U.S. 45 (1967).

## V.

**The uncontested post-trial allegations of the defendants in their motion for a new trial, with regard to threats that were made during the course of the trial against defense counsel by a member of the prosecution's staff, required that the District Court convene a hearing to determine the truth of that allegation, and, if found to be true, then the defendants were clearly deprived of the effective assistance of counsel, thus requiring a new trial.**

In their motion for a new trial, the defendants alleged:

> "Petitioners were denied effective assistance of counsel and the right to a fair trial, because FBI Agent Paul Chamberlain threatened petitioner's attorneys with imprisonment during the trial. This threat was based on a 302 statement made by paid informant Richard Gabriel, concerning an alleged alibi for Amil Dinsio, in which implicated the de-

> fense attorneys. This act by the government was a plot to hinder counsel's assistance to the defense and make them reluctant to speak out against the government's framing tactics employed in this case" (R. 493).

In support of the motion, there were filed with the Court the affidavits of three witnesses with regard to the alleged statements of Mr. Chamberlain (R. 477, 478, 479-480).

Without making any inquiry into thees allegations, the District Court merely noted them (T. 4233) and denied the motion. The Court of Appeals does not mention the point, although it was briefed and argued to that court.

We respectfully submit that, at the very least, the Court was obliged to conduct an inquiry as to whether any such threats were made to defense counsel by the prosecutor's chief investigator who sat at the prosecution table throughout the trial. The issue went directly to the question of whether defense counsel were capable of effectively representing their clients in a complex and wholly contested case. Throughout the trial, the propriety and integrity of agents of the Federal Bureau of Investigation was in issue. It was defense counsel's task to explore that issue completely, both in the courtroom during cross-examination, and out of the courtroom by means of investigation. If in fact, an arm of the prosecution's staff stooped to the use of such tactics, the defendants were clearly deprived of a fair trial. As was stated in *Berger* v. *United States,* 225 U.S. 78, 88 (1925):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win the case, but that justice

shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He many prosecute with earnestness and vigor —indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

We respectfully submit, that this Court should remand this case to the District Court for a hearing as to the full circumstances of any such alleged threats. If threats of the type described were in fact made against defense counsel, then the judgments of conviction should be reversed and a new trial granted.

## CONCLUSION

For all of the above reasons, the joint petition for a writ of certiorari should be granted; the judgments of conviction should be reversed, and a new trial should be ordered.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

### Opinion of the Court of Appeals

# United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 73-1715

No. 73-1716

No. 73-1717

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

—VS.—

CHARLES ALBERT MULLIGAN, PHILIP BRUCE CHRISTOPHER, and AMIL ALFRED DINSIO,
*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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Before: CHAMBERS and DUNIWAY, *Circuit Judges,* and SCHWARTZ,* *District Judge*

### OPINION

DUNIWAY, *Circuit Judge*:

Mulligan, Christopher and Dinsio appeal from convictions on three counts of an indictment. Count I charged

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* The Honorable Edward J. Schwartz, Chief Judge, United States District Court, Southern District of California, sitting by designation.

conspiracy to burglarize the United California Bank (hereinafter referred to as the "Bank") in Laguna Niguel, California, in violation of 18 U.S.C. § 371; Count II charged entering the Bank on or about March 24-27, 1972, with intent to commit larceny, in violation of 18 U.S.C. § 2113 (a); Count III charged theft of money and property of a value exceeding $100, in violation of 18 U.S.C. § 2113(b).

I. *Searches and Seizures.*

Appellants challenge the legality of three searches and seizures.

a. *The Search in Christopher's Residence.*

Viewing the evidence in the light most favorable to the government, the following are the facts. At about 7:30 in the morning, Christopher was arrested by FBI agents at his Cleveland, Ohio, residence pursuant to a parole violation warrant. When arrested in the upstairs hallway, Christopher was wearing only pajama shorts. Once under arrest, Christopher entered his bedroom, followed by the FBI agents, so that he could obtain clothing, and was ordered to sit on his bed. He was not handcuffed.[1] Between two and one-half feet and three and one-half feet from where Christopher was seated was a closet, the door to which was open.

Immediately after Christopher was ordered to sit on the bed, he stood up without permission and picked up a pair of undershorts lying next to the closet. This action surprised the agents, and Christopher was ordered to sit back on the bed. Within 45 to 60 seconds, Christopher again stood up and moved toward the closet. Agent Robert-

[1] *Cf. United States* v. *Baca*, 10th Cir., 1969, 417 F.2d 103, 105.

son, standing between the bed and the closet, put his hand out to stop Christopher; another agent ordered him to return to the bed and asked him what he wanted. Christopher replied that he wanted a pair of pants, whereupon Agent Robertson took a pair of pants hanging on the closet door and passed them to another agent, who emptied the pockets and handed them to Christopher.

Agent Robertson then drew his gun and "brushed the clothing that was hanging in the closet aside to see if there was anybody hiding in there." He felt "a large lump in the bottom of a garment bag, a hard lump that could have been a weapon." He then reached into the garment bag and pulled out a package of money, which contained approximately $30,000 in cash.

Appellants argue that the search violated *Chimel* v. *California*, 1969, 395 U.S. 752, and its progeny. *Chimel* delineated the types of searches permissible incident to a valid arrest:

> There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. 395 U.S. at 763.

The real issue, then, is whether the closet was within Christopher's "immediate control;" was it an "area from within which he might gain possession of a weapon. . . . ?" It was not unreasonable for agent Robertson to search the open closet to see if someone was hiding there with a weapon to help Christopher resist arrest or effect his escape. The search was additionally justified by Christopher's two sudden movements toward the open closet. Although he was ostensibly trying to reach his clothes, these two actions surprised the agents and aroused agent Robertson's suspi-

cions that someone might be hiding in the closet with a weapon. Under these circumstances, the closet was within Christopher's immediate control; it was an "area from within which he *might* gain possession of a weapon. . . ." *Id.* (empsasis added). *See also United States* v. *Wysocki,* 5th Cir., 1972, 457 F.2d 1155, 1160; *United States* v. *Patterson,* 10th Cir., 1971, 447 F.2d 424; *Application of Kiser,* 8th Cir., 1969, 419 F.2d 1134, 1137.

Appellants argue that this case does not fall within the ambit of *Chimel,* citing *United States* v. *Mapp,* 2d Cir., 1973, 476 F.2d 67 and *United States* v. *Shye,* 6th Cir., 1973, 473 F.2d 1061. In *Mapp,* the defendant, a known seller of heroin, was seen to enter the apartment of one Linda Walters carrying a large brown paper bag. After he left the apartment ten minutes later without the bag, federal narcotics agents forced their way into the apartment, arrested Ms. Walters in her bedroom, and demanded the package that Mapp had left earlier. She pointed to a closet in the bedroom. A search of the closet produced a brown paper bag containing two kilograms of heroin. The court held that this evidence must be suppressed. The difference between that case and the one before us is apparent.

In *United States* v. *Shye, supra,* the Sixth Circuit affirmed the District Court's suppression of a bag of money found in a "closet-type depression" next to a water heater in an apartment in which the four defendants were arrested. 473 F.2d at 1063. Although the bag of money was only four feet from one of the defendants, the court held that the area from which the bag was seized was not within the defendant's "immediate control," as defined in *Chimel. Shye* is easily distinguishable from the present case. In *Shye,* as in *Mapp, supra,* the only purpose of the search was to seize evidence. The search here was to protect the agents from possible harm. The latter type of search is expressly condoned by *Chimel;* the former is expressly forbidden without a search warrant.

b. *The Search of Dinsio's Residence.*

On June 27, 1972, a search warrant was issued for appellant Dinsio's residence in Boardman, Ohio. The supporting affidavit contained the following salient allegations:

1. Dinsio was connected with the burglary of the Bank. A June 2, 1972, search of an automobile, discussed *infra*, produced, among other items, a shotgun, walkie-talkies, drills, flashlights and batteries, gloves, hammers, and three gold coins identified as having been stolen during the burglary from a safety deposit box in the Bank. One of the hammers was identified as the tool used to force safety deposit boxes during the burglary. In addition, Dinsio's fingerprints were found on the flashlight batteries.

2. $98,600 was discovered buried in the ground across the street from Dinsio's residence.

3. According to a reliable informant, Dinsio's habit upon completing a burglary was to bury some of the loot.

4. A reliable informant was told by Dinsio that he had robbed an Ohio bank and had a large portion of stolen money in his possession.

5. The Boardman, Ohio, address was Dinsio's sole residence.

6. When Dinsio was arrested he had $537 on his person.

Appellants assert that the affidavit did not state probable cause for the search. The constitutional requirements for a valid search warrant were set forth in *Aguilar* v. *State,* 1964, 378 U.S. 108, and further explicated in *Spinelli* v. *United States,* 1969, 393 U.S. 410. *Aguilar* requires an affidavit that discloses the underlying circumstances from which the affiant has concluded that his information is reliable and that contains a statement of the underlying

circumstances "to enable the magistrate independently to judge of the validity" of the affiant's conclusion that the things to be seized are where he says they are. *United States* v. *Bailey,* 9th Cir., 1972, 458 F.2d 408.

On appeal, the test applied by this court is that "[t]he facts submitted to the Commissioner must be sufficient to justify a conclusion by him that the property which is the object of the search is probably on the person or premises to be searched at the time the warrant is issued." *Durham* v. *United States,* 9th Cir., 1968, 403 F.2d 190, 193. Moreover, if "in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preferences to be accorded to warrants." *United States* v. *Ventresca,* 1965, 380 U.S. 102, 109.

Here the magistrate had before him six important allegations concerning Dinsio. In reviewing the affidavit, we ignore the fourth allegation listed above. The fact that Dinsio told an informant that he had robbed an Ohio bank is irrelevant to a search warrant which on its face is specifically limited to evidence related to the robbery of a California bank. Nevertheless, the remaining five allegations did present sufficient probable cause. They linked Dinsio with the crime, and the allegation concerning the buried money linked him with evidence of the crime. The latter allegation meets the double test of *Aguilar.* Although there was no direct evidence that any evidence from the burglary was inside Dinsio's residence, there was sufficient evidence from which the magistrate could use his common sense to infer that the loot and tools, if not buried, were probably in the house. *United States* v. *Ventresca, supra,* 380 U.S. at 108. The fact that Dinsio was arrested with

only $537 on his person and that the Boardman house was his sole residence increased this probability.[2]

Because "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause," [3] we conclude that the affidavit contained a sufficient constitutional basis for a finding of probable cause.

On June 2, 1972, a search warrant was issued for a 1962 Oldsmobile automobile parked in the driveway of one Earl Dawson in Tustin, California. Appellant Mulligan had brought the car to Dawson's residence in late March, 1972, and it remained there until the June 2 search. The car was registered under a fictitious name at a nonexistent address.

The government argues that appellants lack standing to attack the search of the Oldsmobile. Appellants Christopher and Dinsio do lack standing. Suppression of a search "can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman* v. *United States*, 1969, 394 U.S. 165, 171-72. *See also Jones* v. *United States*, 1960, 362 U.S. 257, 261; *Diaz-Rosendo* v. *United States*, 9th Cir., 1966, 357 F.2d 124, 130-34, *cert. deneid*, VTFF, 385 U.S. 856.

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[2] *See also United States* v. *Lucarz*, 9th Cir., 1970, 430 F.2d 1051, 1055: "The situation here does not differ markedly from other cases wherein this court and others . . . have upheld searches although the nexus between the items to be seized and the place to be searched rested not on direct observation, as in the normal search-and-seizure case, but on the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property."

[3] *Spinelli* v. *United States*, 1969, 393 U.S. 410, 419; *see also Beck* v. *Ohio*, 1964, 379 U.S. 89, 96-7.

c. *The Search of a 1962 Oldsmobile.*

As to Mulligan, the government presents four reasons why he has no standing:

1. He had no control over the Oldsmobile when it was searched.
2. He was not present during the search.
3. He was not the registered owner of the Oldsmobile.
4. He had surrendered possession of the car to Dawson for over two months before the search.

The standard for standing was stated in *Jones, supra*: "In order to qualify as a 'person aggrieved by an unlawful search and seizure' [*see Fed. R. Crim. P.* 41(e)] one must have been a victim of a search or seizure, one against whom the search was directed. . . ." 362 U.S. at 261. The fact that a person neither has control over the premises nor is present during the search does not preclude him from being a victim of that search and seizure. As to the government's third objection, despite the fact that the car was registered under a fictitious name, Muligan was nevertheless the true proprietor. Concerning the fourth point, Mulligan did not abandon possession of the car; he telephoned Dawson on June 2 to say that he was going to get it on that day. Mulligan has standing to challenge the search.

Mulligan argues that the supporting affidavit failed to set forth sufficient facts to establish probable cause.

The affidavit contained the following allegations:

1. There was circumstantial evidence showing that the appellants, all of whom had prior convictions, were in California during March, 1972, and left immediately after the Bank burglary.

2. Mulligan used Dawson's house for a "private meeting" and asked if he could leave his Oldsmobile at Dawson's for three weeks.

3. The car was registered to a fictitious owner at a nonexistent address.

4. In late March, Mulligan told Dawson that he was going to buy some "tools," and drove off in the car. He returned the car the same day, where it remained until the June 2 search.

5. An FBI agent looked through the car windows on June 2 and saw a pair of gloves similar to a pair found at the scene of the burglary as well as a footprint made with a light-colored powdery substance resembling the crushed concrete found in the Bank's vault.

6. Mulligan telephoned Dawson on June 2 to say that he was flying out from Cleveland to get the car.

These allegations meet the constitutional standards of *Aguilar* and *Spinelli, supra*. The affidavit is even stronger than the one supporting the warrant for the search of Dinsio's residence; it shows direct observation of objects similar to those found at the scene of the burlary.

II. *The Admissions of Mulligan and Dinsio—Bruton*

The trial court, over objection, allowed Dawson to testify to a conversation he had with Mulligan on June 2, 1972, in which Mulligan implied that he was involved in the Bank burglary. The court also admitted, over objection, statements made by Dinsio to one Richard Gabriel at the Los Angeles County Jail after Dinsio's arrest, in which Dinsio admitted his participation in the burglary. The jury was instructed that they were to consider the above statements as evidence only against the declarant and not against any of the co-defendants.

Appellants argue that the admission of these statements violated *Bruton* v. *United States,* 1968, 391 U.S. 123. In that case, the Court held that the introduction of an extrajudicial admission of one defendant that implicates or inculpates a co-defendant violates that co-defendant's sixth amendment right to confrontation. Appellants' reliance on *Bruton* is misplaced. Mulligan's statements inculpated only Mulligan. Dinsio's statements inculpated only Dinsio. Appellants ask us to extend the *Bruton* rule to exclude the admission of one defendant even though the admission does not directly implicate a co-defendant. We decline to do so.

There is little danger that a jury in a joint trial, in weighing the evidence against A, will consider against A an admission by B concerning only B's activities. Following the appellants' argument to its logical conclusion would require separate trials in every case where any defendant has made an admission. Such a holding is wholly unwarranted.

III. *The Admissions of Mulligan and Dinsio—Massiah*

Appellants argue that Mulligan's admission to Dawson and Dinsio's admission to Gabriel violated the rationale and spirit of *Massiah* v. *United States,* 1964, 377 U.S. 201. We disagree.

*Massiah* held that a defendant was denied his sixth amendment right to counsel "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206. Mulligan's statement was made before he was arrested. The Supreme Court has unequivocally rejected the argument that *Massiah* should be extended

to pre-arrest statements. *Hoffa* v. *United States*, 1966, 385 U.S. 293, 309-10. *Massiah* is also inapposite to Dinsio's statements to Gabriel. *Massiah* excludes only evidence which federal agents elicit from the defendant. 377 U.S. at 206. It was only after Dinsio admitted participation in the burglary to Gabriel that the latter contacted FBI agents and gave them a statement. Gabriel was not a "creature of law enforcement" when Dinsio confessed to him.

Affirmed.